



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

ANTI-CORRUPTION CRIMINAL APPEAL NO. 4 OF 2016

CHRISANTUS ALEKE ATEBE.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal arising from conviction and sentence in Milimani Chief Magistrate's Court Anti-Corruption Court in Criminal Case No. 8 of 2014 delivered by Hon. L.N. Mugambi Senior Principal Magistrate on 28th July 2016.

JUDGMENT

1. **Chrisantus Aleke Ateba** the Appellant was charged and convicted of three counts of offences under the Anti-Corruption & Economic Crimes Act No. 3 of 2003 (ACECA). The first and second counts were on corruptly soliciting for a benefit contrary to section 39 (3) (a) as read with Section 48 (1) of ACECA. The 3rd count was on corruptly receiving a benefit contrary to Section 39 (3) as read with Section 48 (1) of ACECA.

2. The particulars are clearly set out in the Charge Sheet and in the Judgment by the trial court. Upon conviction, he was fined as follows;

Count 1 (C1) – Kshs.50,000/= in default to serve one (1) year imprisonment;

Count 2 (C2) – Kshs.25,000/= in default to serve six (6) months imprisonment; and

Count 3 (C3) – Kshs.30,000/= in default to serve six (6) months imprisonment.

3. Being aggrieved with the conviction and sentence, he filed this appeal citing the following grounds;

1. The learned Magistrate erred in fact and law in finding that the offences of solicitation and receiving a benefit had been proved beyond reasonable doubt.

2. The learned Magistrate erred in law in admitting entrapment evidence presented by the Prosecution to prove the charges facing the Appellant and therefrom, reaching a finding that there was neither direct nor indirect inducement of the Appellant into committing the offences charge.

3. The learned Magistrate erred in fact and law in finding that a bona fide enquiry was not required to be conducted by the Ethics and Anti-Corruption Commission's (EACC) officers and the Prosecution in obtaining and presenting evidence to the trial court.

4. The learned Magistrate erred in fact and in law in disregarding the substance of the Appellant's unsworn statement of defence.

5. The learned Magistrate erred in fact and law in finding the existence of mens rea and conclusion that the Appellant had the original criminal intent for the offences charged.

6. The learned Magistrate erred in law in giving the Appellant an unduly harsh and severe sentence not in keeping with the Sentencing Guidelines and comparative cases.

4. The prosecution called a total of eight (8) witnesses to support its case. Its case is that **PW1 Catherine Sally Wanjiru Wachira** was driving motor vehicle Mitsubishi Pajero Registration No. KBJ 464P from Lang'ata to Narok using the Southern bypass. She overlapped traffic on the left side of the road next to the MHC houses. A policeman she identified as the Appellant was on a motorbike and he

approached her. He asked her to follow him with her car towards Lang'ata.

5. She did as directed upto the point the Appellant stopped and signaled her to park her car on the right hand side of the intersection of the by-pass with Lang'ata road. She parked, alighted and went to the Appellant, and tried to apologize in vain. There were several vehicles parked there. He then directed her to follow him to Lang'ata Police Station, which she did. He told her, she had committed an offence. She asked him what she should do and he told her to give him Kshs.3,000/=.

6. The Appellant was adamant about the Kshs.3,000/=. She tried to contact friends to get her the cash in vain. He even asked her about going to an ATM but she did not know how long it would take. The Appellant told her to follow him into the police station. She obeyed and they walked past the report desk into an empty room.

7. While there, he wrote down her name on a paper, and demanded for her car keys but she ignored. He told her to follow him to Nyayo Stadium Police Station and he would take her to court. Meanwhile, she was to get him Kshs.3,000/= for release of her driving licence which he had taken at the bypass. She identified the driving licence No. 5591953 as **Exhibit 1**.

8. She got into her car and drove along Langata road but stalled due to lack of fuel. She was rescued by a friend and it was then she turned and drove to Integrity Centre to report. Her statement was recorded by **PW8 No. 83827 Cpl. Jackline Makena**. She was introduced to a recording device (**Exhibit 2**) which was confirmed to be working and she signed a form to confirm that (**Exhibit 3**).

9. She went to Nyayo Stadium Police Station to see the Appellant for her driving licence, as she recorded the conversation. The Ethics and Anti-Corruption Commission (EACC) officers followed her. When she arrived at the station, the Appellant walked towards her and they had a discussion. He wanted to know why she had disappeared. She explained how she had gone to look for the Kshs.3,000/= he wanted. He inquired to know how much she had got, she told him it was Kshs.2,000/= which was in her mpesa account. He was ready to take that and he directed her to an Mpesa outside the post but she had to leave the car.

10. She went to Kobil Petrol Station next to Kengeles hotel, where the EACC officers were waiting. They listened to the recording of the conversation she had had with the Appellant and the officers established that there had been a demand. PW8 had an envelope with Kshs.3,000/= but after the Appellant had accepted to receive Kshs.2,000/= the extra Kshs.1,000/= was removed. She was given the Kshs.2,000/= (**Exhibit 5 a and b**) in a cut envelop (**Exhibit 4**). The two notes had been photocopied (**Exhibit 6**). She signed an inventory (**Exhibit 7**) to that effect.

11. She placed the money in her pocket and left for the Nyayo Stadium Police post, where she found the appellant outside the gate with an officer known to her. She went to them and greeted the other officer. The Appellant inquired if she knew his colleague and she answered in the positive. He then asked her to follow him. She was all along recording the conversations. The Appellant was still holding her driving licence. She followed him to a parked motor cycle on which he leaned. He asked her to get the money and get closer to him.

12. She removed the money from her sweat shirt pocket after folding it. He called a colleague of his whom he asked to get close. She gave him the money and he gave back her licence telling her to go away.

13. At that point, she scratched her head as a signal to the EACC officers who were waiting and they came. It was afternoon by then. **PW6 Sophia Nyambu** came and took the recorder plus envelope and they went to their offices. On 4th April, 2014, she went to Integrity Centre and was able to watch the clip and identified her voice and that of the Appellant.

14. **PW2 Marian Njeri Chege** is a government analyst, who examined the exhibits for the presence of APQ powder. Her evidence is that, the APQ powder was traced in Exhibit 4, 5a and b, 8 – 12. She produced her report as Exhibit 14.

PW3 No. 232517 Chief Inspector Agnes Kunga the in-charge of Traffic at Langata Police Station. She confirmed that she was on duty on 27th March, 2014 from 5 am and assigned duties to various officers. She left the station shortly leaving Sgt. Karanu Elema stepping in for her. At 12.45 pm, he called and informed her of the Appellant's arrest. She proceeded to Nyayo Police Post at 1.30 pm and confirmed the arrest in respect of a demand for a bribe.

15. On 12th June, 2014 she was summoned for recording of a statement. She also watched a clip which was played and she was able to identify the Appellant. She confirmed that the detention of PW1's driving licence was recorded in the OB. The offence she had committed was overlapping. She did not see anything wrong with an officer requesting a suspect to follow him/her to Nyayo Police Post.

16. **PW4 No. 234101 Inspector Nditim W. J. Musi**, **PW5 No. 52068 Sgt. Richard Mbithi**, **PW6 Sophia Nyambu**, **PW7 No. 53971 Cpl. James Wachira** and **PW8 No. 83827 Cpl. Jackline Makena** are all EACC officers who were involved in this investigation and they accompanied PW8 to the Nyayo Stadium Police Station. Their evidence on the happenings of this date in issue is similar. PW8 is the one who instructed PW1 on how to use the recording gadget, treated the initial Kshs.3,000/= (**Exhibit 6 and 7**) after preparing a team (**PW4 – PW7**) to work with her in this operation.

17. The Appellant was arrested by PW4 and PW7 while PW6 took the swabs of his hands and the motor cycle handles. PW5 searched the Appellant and recovered Kshs.2,000/= from his trousers' left pocket and handed it to PW8 who compared it with the photocopy she had. She confirmed that the serial numbers tallied. An inventory (**Exhibit 16**) was prepared and signed. Also recovered was the Appellant's pair of trousers where the money had been recovered (**Exhibit 12**) and a Certificate of Appointment (**Exhibit 19**).

18. PW8 is the one who prepared the exhibit Memo and forwarded the exhibits to the Government Chemist for examination. Together with PW1, they transcribed the video recording (**Exhibit 3a**). She made a certificate to that effect (**Exhibit 3b**). She then charged the Appellant with the 3 counts of offences. The complainant's driving licence was produced as Exhibit 15. This witness told the court that any cash bail

could have been processed at Lang'ata Police Station and one did not need to go to Nyayo Stadium police post to process it.

19. The Appellant elected to make an unsworn statement for his defence. He stated that as at 16th May, 2016, he had 15 years' experience as a police officer. That on 27th March, 2014 he was on duty along Lang'ata road from Bomas to Lusaka road roundabout, near Nyayo Stadium. He stopped PW1 who was overlapping while driving motor vehicle No. KBJ 464P Pajero. He requested for her driving licence which is the standard procedure. He directed her to Lang'ata Police Station for processing as it was the nearest police station.

20. PW1 indicated to him that she was in a hurry. He too had been assigned duties of taking charge sheets to Kibera Law Courts. He then advised that she follows him to Nyayo Police Post for processing of the cash bail and being taken to court. The same morning, he had told her the cash bail was Kshs.10,000/= and she never told him she did not have the said money. He reached the police post and waited for PW1 in vain and he went to Kibera Law Courts.

21. He later on returned to Nyayo Police Post where traffic police officers from Lang'ata Police Station assemble. He booked PW1's driving licence in the OB at Nyayo Police Post as OB No. 5 27.3.2014 10 am for overlapping. At noon time, she saw PW1 coming at Nyayo Police Post. He asked her the reason for her delay and she informed him that she had run out of fuel.

22. He believed that PW1 was genuinely asking for help and not to entrap him so he did his best. The Divisional Traffic Office is based at Nyayo Police Post and that's why he had asked PW1 to go there. He denied extorting money from PW1 nor attempting to evade arrest.

23. When the appeal came for hearing, **Mr. Kanjama** for the Appellant submitted that the transcript and recording were not properly admitted. He referred to Section 78 (1) of the Evidence Act together with Section 106 of the Evidence Act on admissibility of electronic evidence. He argued that there is evidence of manipulation, such evidence cannot be relied on. That PW1 confirmed interference. He referred to the case of **Republic –vs- Maqsud Ali 1965 2 All ER**, to support his argument.

24. Counsel submitted that this was a case of entrapment whereby PW1 tried as much as possible to make the appellant change his mind in charging her. She also tried her best to extract evidence from him. He referred to the case of **Mohammed Koriow Nur –vs- The Attorney General [2011] eKLR** submitting that entrapment is a defence. Counsel referred to the evidence of **PW6 Sophia Nyambu** where he conceded that the Appellant asked PW1 for Kshs.10,000/= for cash bail. Further, that **PW7 No. 53971 Cpl. James Wachira** said, when he looked at the recording, he never noticed the request for a bribe. Also, referred to is the case of **Keith Jacobson –vs- United States, Supreme Court of the United States 503 US 540 (1962)**.

25. Mr. Kanjama submitted that the transcript was not a true reflection of the recording as the translation was not accurate. Further, that there was no proof of corroboration in PW1's evidence and the recording. Counsel finally submitted that the sentence was not in line with the sentencing guidelines.

26. Mrs. Aluda for the respondent in her response and submissions, denied that this was a case of entrapment. She said, the Appellant demanded so much from PW1 until she got so worked up. That he was demanding Kshs.3,000/= from her. She drove to EACC and lodged a complaint. It was her submission that there was no entrapment but gathering of evidence.

27. She further submitted, that the prosecution produced sufficient evidence which was properly admitted. That the Appellant took Pw1 to a corner in order to receive the money which was not for bail.

Referring to the case of **Mohammed Nur (supra)** she said, the two cases are so different. She also stated that the Learned Trial Magistrate considered the Appellant's unsworn evidence.

28. According to her, the prosecution witnesses were cross examined at length by the defence counsel, and it was shown that the Appellant demanded for a bribe as reported. Finally, she submitted that the sentence was proper and lawful.

29. In a rejoinder, Mr. Kanjama submitted that there was never a demand, and it was PW1 who offered the money.

30. This is a first appeal and this Court has a duty to re-consider a re-evaluate the evidence afresh and arrive at its own independent conclusion. An allowance must always be made since this Court did not, unlike the trial court see and hear the witnesses.

See **Okeno –vs- Republic 1972 EA 32** and **Joseph Njuguna Mwaura & 2 Others –vs- Republic eKLR, Criminal Appeal No. 5 of 2008**.

31. The Court of Appeal in the case of **Patrick and Another –vs- Republic [2005] 2 KLR 162** stated thus;

“3. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's won decision on the evidence. It is not the function of first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusion.”

32. I have considered the evidence on record, Grounds of Appeal, Submissions by both counsel and the authorities cited. The issues I find falling for determination are:

(i) Whether this was a case of entrapment?

(ii) Whether the electronic evidence on solicitation and receipt of a bribe was properly received by the trial court?

(iii) Was there sufficient evidence to convict the appellant?

(iv) If issue No. (iii) is in the affirmative, was the sentence harsh and severe?

Issue No. (i) Whether this was a case of entrapment.

33. What is entrapment? The dictionary defines “entrapment” as;

“The action of tricking someone into committing a crime in order to secure their prosecution.”

The Black’s Law Dictionary Ninth Edition at page 612 defines it as follows;

“1. A law-enforcement officers or government agent’s inducement of a person to commit a crime, by means of fraud or undue persuasion, in an attempt to later bring a criminal prosecution against that person.

2. The affirmative defence of having been so induced. To establish entrapment (in most states) the defendant must show that he or she would not have not committed the crime but for the fraud or undue persuasion ---“

34. To support his argument that this was a case of entrapment, the Appellant cited the case of **Mohamed Koriow Nur (supra)**. The facts in the said case are to the effect that Mohamed was enticed and made to believe that a bad report was just about to be made against him, when this was not the case. He then got into a discussion with his accuser on how much to give him to write a favourable report. The accuser then used that to get Mohamed Nur charged. In that case, his accuser (Mr. Jeremiah Buchianga) investigated the offence. The facts in the present case are totally different from what happened to Mohammed Nur, hence its inapplicability.

35. The facts in respect of this case are so clear. A traffic offence was committed by the complainant (PW1). It was even booked in the OB. There is no evidence that PW1 did induce, entice or unduly persuade the Appellant to receive money from her. My finding is that this was not a case of entrapment.

Issue No. (ii) Whether the electronic evidence on solicitation and receipt of a bribe was properly received by the trial court?

36. There is no dispute that the appellant is an employee of the National Police Service, a public body which had employed him as a police constable. This was confirmed by **PW3 No. 232517 Chief Inspector Agnes Kunga, the Appellant** himself and his Certificate of Employment (**Exhibit 19**). After PW1 made a complaint to the EACC, she was fitted with a recording device in which a conversation was recorded. A second conversation was recorded at the time money was changing hands.

It is Mr. Kanjama’s submission that this evidence in the recording device was not properly received under Section 78 and 106 of the Evidence Act. There was no photo produced and/or admitted before the Court for receipt under Section 78 Evidence Act.

Section 106B of the Evidence Act provides;

“(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as “computer output”) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

38. The conditions to be complied with are those set out in Section 106 (2) of the Evidence Act. These must be satisfied before the evidence is admitted. I must point out that even before **PW8 No. 83827 Cpl. Jackline Makena** testified, the witnesses who came before her had testified on the recorded evidence and the video clip. The same had been played in court before PW8’s testimony and the court has made its remarks at pg 14-15 of the Record of Appeal.

39. PW8 is the officer who prepared the recording gadget for the assignment. She prepared a certificate in compliance with Section 106B. This certificate was produced as Exhibit 3. Section 106B (4) Evidence Act provides;

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in subsection (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

40. In the certificate (Exhibit 3), the witness (PW8) has clearly set out what she did and confirmed that the device had been tested in the presence of the complainant and the device was found to be in good working condition. This is all in support of the evidence being produced under Section 106B Evidence Act. Besides this certificate there is no other certificate which should have been produced. S106B (4) of the Evidence Act was therefore complied with.

41. Secondly, still on this point of the device, there was no evidence adduced to show that any of the conditions in Section 106B (2) and Section 106B (4) Evidence Act was not complied with to make the evidence inadmissible.

42. In the case of Republic –vs- Maqsd Ali; Republic –vs- Ashiq Hussain (1965), 2 ALL ER the court stated thus;

“A tape recording is admissible in evidence provided the accuracy of the recording can be proved and the voices recorded can be properly identified and that the evidence is relevant and otherwise admissible. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged.

Provided that the jury are guided by what they hear themselves from the tape recording and on that they base their ultimate decision, there is no objection to a copy of a transcript of a tape recording, properly proved being put before them.”(Emphasis mine)

43. The court having been guided by the procedure set out in Section 106A and 106B of the Evidence Act which were complied with by PW8, I do find that the electronic evidence was properly received. The appellant was properly identified in the clips.

Issue No. (iii) Was there sufficient evidence to convict the appellant?

44. Besides the electronic evidence was the evidence of PW1. She explained in detail what had transpired after she was stopped along Lang’ata road, which is next to Lang’ata Police Station. The said station has a Traffic Department housed there. The department is headed by **PW3 No. 232517 Chief Inspector Agnes Kunga** who did not see anything wrong with a suspect being commanded to follow a police officer rider from Lang’ata Police Station to Nyayo Stadium Police Post to pay a **“cash bail”**. Cash bail can be paid at any police station and not necessarily Nyayo Stadium Police Post. There was therefore no good reason for having PW1 go all the way to Nyayo Stadium.

45. PW1 filed a formal complaint after all that the Appellant had taken her through. The evidence on record shows that he had booked her in the OB for overlapping. He also had her driving licence detained but she was never charged. In his defence, the Appellant does not mention anything about the driving licence or the cash he is alleged to have demanded and received.

46. It is assumed that upon booking PW1 in the OB, and even mentioning that he had detained the driving licence the same remained under the custody of the Traffic Police. The question now is at what point the driving licence was released to PW1. PW1 said, it was upon receipt of the Kshs.2000/= that the Appellant released her driving licence to her. The Appellant did not say anything on this issue in his defence.

47. PW1 gave a very detailed account of the Appellant’s conduct on Lang’ata road and Lang’ata Police Station before leaving for Nyayo Stadium Police Post. PW1 and the Appellant were not known to each other. It cannot therefore be said she had any reason to fabricate him.

48. Upon her report to EACC, the demand by the Appellant was confirmed in the recorded conversation before she was given the treated money. All this time, the Appellant had an opportunity to pull himself out of this issue but he did not because he wanted the money.

The Appellant has no one but himself to blame for what befell him

49. PW1’s testimony has been well corroborated by the evidence of the recorded conversation and video and the transcript. The small differences in the tenses put in Kiswahili do not go to the root of the conversation. I am satisfied that indeed the evidence on record supports the charges.

Issue No. (iv) If issue No. (iii) is in the affirmative, was the sentence harsh and severe?

50. On sentence, I consider that C1 and C2 are similar. There is no explanation for one carrying a fine of Kshs.50,000/= while the other is Kshs.25,000/-. I will therefore set aside the sentence on C1 and impose a fine similar to that in C2 i.e. Kshs.25,000/=, in default, six (6) months imprisonment. Any excess paid to be refunded to the appellant.

51. Save for the sentence on C1, I disallow the appeal and uphold the conviction and sentence.

Orders accordingly.

Signed, dated and delivered this 31st day of May, 2018 in open court at Nairobi.

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HEDWIG I. ONG'UDI

HIGH COURT JUDGE